APPEAL NO. 010766

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 22, 2001. The hearing officer resolved the disputed issue by determining that the respondent (carrier) may avoid liability for the appellant's (claimant) spinal surgery, if any, because there is no second, concurring opinion to the amended recommendation for spinal surgery by the claimant's doctor, Dr. M. The claimant appeals and urges that the hearing officer's decision and order be reversed because the carrier's second opinion doctor, Dr. DF, was not qualified pursuant Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(d) (Rule 133.206(d)) to render an opinion on the necessity for spinal surgery. The carrier neither appeared at the CCH nor responded to the claimant's request for appeal.

DECISION

Affirmed.

The hearing officer did not err in determining that the carrier was relieved of liability for the claimant's proposed surgery because no other doctor chosen in the second opinion process concurred with the surgical recommendation. The documentary evidence introduced showed that the recommendation for surgery from the claimant's treating doctor, Dr. M, found no support from either the carrier's second opinion doctor, Dr. DF, or the claimant's second opinion doctor, Dr. H. Both Dr. DF and Dr. H ultimately decided that the claimant was not a candidate for spinal surgery. The hearing officer also concluded that the determinations of Dr. DF and Dr. H constituted nonconcurrences within the meaning of Rule 133.206(a)(14) and were not contrary to the great weight of the other medical evidence.

As stated above, the claimant challenged the correctness of the second opinion rendered by Dr. DF. We note here that the claimant does not challenge the substance of Dr. DF's opinion, but disputes the qualifications of Dr. DF for giving a spinal surgery opinion at all, pursuant to what he argues are the requirements of Rule 133.206.

The claimant argued that Dr. DF was required, at the time of his examination of the claimant, to maintain an active spinal surgery practice. There was no evidence presented that Dr. DF was not on the Texas Workers' Compensation Commission's (Commission) list and sublist of spinal surgery second opinion doctors or lacked the qualifications for being initially placed on the list. Likewise, there was no evidence that the procedures for suspension from the list as set forth in Rule 133.206(c) had been undertaken by the Commission; in any case, the grounds for removal set forth in Rule 133.206(c)(4) do not include [failure to maintain] an active surgical practice.

Likewise, the qualifications for the second opinion doctor set out in Rule 133.206(d) do not include a requirement for active surgical practice. To the extent that there was any testimony on those listed qualifications, it consisted only of a negative answer by the

claimant's treating doctor to a question as to whether he had ever seen in Dr. DF's office any evidence of a specialty training in spinal surgery. This falls far short of constituting probative evidence that Dr. DF in fact had no specialty training in spinal surgery and did not meet the qualifications set forth in Rule 133.206(d) and the hearing officer correctly did not credit it as such.

Finally, there was no evidence that there are "extenuating" circumstances (Section 408.026(a)(3)), or that the carrier waived its right to a second opinion. Consequently, the carrier would be liable for spinal surgery in this case only if there was a second concurring opinion, Section 408.026(a)(1). There is none in this case and the hearing officer's decision is thus sufficiently supported. We affirm the decision and order.

	Susan M. Kelley Appeals Judge
CONCUR:	
Philip F. O'Neill	
Appeals Judge CONCUR IN THE RESULT:	
Gary Kilgore Appeals Judge	